



Texas Department of Insurance

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August 4, 1993

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Opinion Committee

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Certified Mail No. 207 696 555
Return Receipt Requested

RQ-655

Dear General Morales:

The Texas Department of Insurance (hereinafter "Department") requests your official opinion concerning the validity of House Bill No. 1461 §20.26, which amends Texas Insurance Code article 5.76-2 §4.04, to be effective September 1, 1993. House Bill No. 1461 §20.26 states:

"(a) Section 4.04, Article 5.76-2, Insurance Code, is amended by adding Subsection (q) to read as follows:

(q) The pass-through allowances authorized in Subsections (d) and (e) hereof shall be deemed exclusive subsequent to the effective date of this article, but other methods utilized prior to such effective date shall be deemed valid if consistent with the purpose of this article and if the premium resulting from their use is less than the premium which would have been charged for a similarly rated risk in the Rejected Risk Fund.

(b) The validation made by this amendment shall govern any civil or regulatory proceeding except a civil proceeding pending in a court of competent jurisdiction on May 1, 1993, including civil proceedings filed on or before May 1, 1993, which are seeking class action status, whether or not the plaintiff or defendant classes have been certified."

Prior to the enactment of Texas Insurance Code Ann. art. 5.76-2 §4.04, which was effective on January 1, 1991, there was no provision in the Texas Insurance Code which allowed insurers to pass through the assigned risk assessment charges to insureds. Insurers could use only those rates which were made, established, promulgated and prescribed by the Board. (See Texas Insurance Code Ann. 5.56 (Vernon 1981).) On May 1, 1991, the Board issued new rules which will prospectively provide for the pass through of risk assessment charges, pursuant to Texas Insurance Code Ann. art. 5.76-2 §4.04(e). The Board has yet to authorize insurers to pass through risk assessment costs to insureds.

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House Bill 1461 §20.26 validates the actions of insurers which passed through risk assessment costs to insureds prior to January 1, 1991. The Texas Department of Insurance is aware of numerous insurers which charged unauthorized risk assessment costs to insureds during this time. House Bill 1461 §20.26 prohibits insureds from seeking redress in the civil courts and stays any action by the Texas Department of Insurance, thus eliminating any remedy for the alleged wrongdoings. Ultimately, if House Bill 1461 §20.26 remains in place, Texas insureds will be deprived of millions of dollars in restitution.

The question presented for an official opinion is:

Whether House Bill No. 1461 §20.26 violates Article I, § 16 of the Texas Constitution?

It is the opinion of the Texas Department of Insurance that the answer is yes. Article I, §16 of the Texas Constitution states "No Bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made." House Bill No. 1461 §20.26 violates this section in that it is improperly retroactive.

A statute is unconstitutionally retroactive if it impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or adopts a new disability with respect to transactions already passed. *McCain v. Yost*, 284 S.W.2d 898 (1955); *Keith v. State*, 760 S.W.2d 746 (Tex.App. - Fort Worth 1988, no writ); *Durish v. Texas State Board of Insurance*, 817 S.W.2d 764, 766 (Tex. App. - Texarkana 1991, writ ref'd n.r.e).

In *Amarillo Gas Co. v. City of Amarillo*, 208 S.W. 239 (Tex.Civ.App. - Amarillo 1919, no writ), the court held that a city ordinance which imposed a surcharge on gas bills could not be applied to services supplied before the effective date of the ordinance. "Any law that would retroact so as to change the substantial rights and obligations of this contract as to transactions already had under it would be to that extent unconstitutional and void." 208 S.W. at 240. The court found that the practical result of the ordinance would require the consumer to pay considerably more for his gas than he would have been required to pay under old rates. Similarly, House Bill 14.61 §20.26 increases the costs of workers compensation insurance, for insurance coverage provided in the past, by validating any excess charges made by insurers to cover risk assessment costs.

In *Durish v. Texas State Board of Insurance*, 817 S.W.2d 764 (Tex. App. - Texarkana 1991, writ ref. n.r.e.), the court of appeals held that a provision of the Texas Insurance Code was a retroactive law in violation of Article I, §16 of the Texas Constitution. Texas Insurance Code article 21.79D provided that an insurance company which brought an action against fraudulent insurance practices could recover its related expenses by way of an offset against any obligations it owed to the state. The statute was enacted in 1989, but applied to any actions commenced after January

July 27, 1993

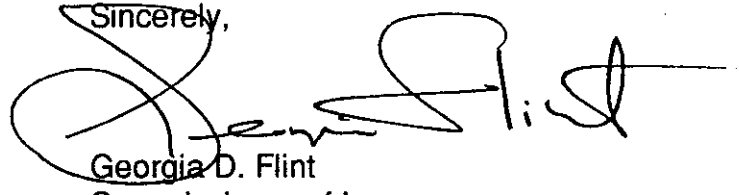
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1, 1987. The court held that the obligations owed to the state were vested rights of the state which could not be impaired by a retroactive law. 817 S.W.2d at 767. Further, the court found that, "State officials have not only the right, but the duty, to challenge actions to be taken pursuant to a statute that is unconstitutional." *Id.*

Your assistance in this matter is appreciated. Please contact Frederick M. Hawk, Acting Director of Compliance/Intake, at 475-0991 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Georgia D. Flint". The signature is stylized with a large, looped initial "G" and a long, horizontal stroke extending to the right.

Georgia D. Flint
Commissioner of Insurance